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High Law and Low Law

Lawrence M. Friedman^{*}

In 1953, in San Mateo County, California, Janet Bruno filed a petition in the Superior Court asking for a divorce from her husband, James C. Bruno. James, she claimed, had committed acts of extreme cruelty against her. Janet's mother, in a deposition, swore that James had admitted to her that he stabbed his wife in the back. Also, that he once tore off his wife's blouse and gave her a "severe beating." And that, at one time, he threatened her with a loaded gun. Moreover, James was in the "habit of calling [her] . . . vile and indecent names." As a result, Janet "lost considerable weight and became very nervous." James said not a word in his defense, and the Superior Court granted Janet her divorce.¹

Was James Bruno really such a brute? The court files of San Mateo County certainly present us with the image of cruel and violent man. Should we believe the files? Any scholar of the history of divorce law would be skeptical. She would know that what you read in divorce files, before the 1970s, cannot be taken at face value. What the plaintiff claimed about the defendant, the accusations he or she made, were most likely either lies or exaggerations. Divorce files, in this regard, were for the most part pious shams. Indeed, divorce law, in the nineteenth and early twentieth centuries, was a prime example of what I have sometimes called a dual system. There was a radical difference—a chasm—between the official rules and the working law of divorce. Of course, as we all know, law on the books and law in action are never the same. But there are cases—and divorce law in the period before 1970 was one of those cases—where the gap is such a yawning chasm, that we feel as if we are looking at two completely different systems.²

The formal law of divorce was plain and fairly clear-cut. A marriage could only be ended in court, with a decree of divorce. But only a virtuous spouse, whose partner had committed some serious offense against the

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¹ The case is *Bruno v. Bruno*, San Mateo County # 60326, filed Jan. 2, 1953. The case is cited in Alberto Brandt Lopez, *Divorce and Annulment in San Mateo County, California 1950-1957* (Dec. 2005) (unpublished J.S.D. dissertation, Stanford University School of Law) (on file with Stanford University Libraries).

² See, e.g., LAWRENCE M. FRIEDMAN, *PRIVATE LIVES: FAMILIES, INDIVIDUALS, AND THE LAW* 17-94 (2004); JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, *INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA* 161-90 (2011); see generally GLENDA RILEY, *DIVORCE: AN AMERICAN TRADITION* (1991).

marriage, was entitled to get that decree. The local statute listed the available “grounds” for divorce. In some states the list was fairly long; in some it was short. Adultery was on the list in every state; indeed, in New York, adultery was essentially the only grounds for divorce.³ Desertion and cruelty were almost always on the list, along with such things as non-support, drunkenness, or (in Illinois) infecting a wife with a venereal disease.⁴ In all states in the nineteenth century, there was no such thing as consensual divorce. A man and a woman could agree to get married; but they could not agree to get divorced. There had to be grounds for divorce; just wanting to end the marriage was not legally enough. Moreover, a “collusive” divorce was illegal. If a judge suspected that the parties were inventing grounds for divorce, in other words, telling lies in order to satisfy the statute, he was supposed to deny the divorce.⁵ A court, according to the law, had no power to grant a divorce just because the defendant defaulted, or refused to contest, or admitted that what the plaintiff said was right. What was needed was actual proof of bad behavior. As a Vice Chancellor of New Jersey put it in 1910, if the spouses “agree that one of them shall bring a suit for divorce, and that no defense shall be made,” then the parties are guilty of “collusion,” and the divorce should not be granted.⁶

This was theory. The reality, however, was entirely different. From about 1870 on, collusive divorces were, in fact, the norm—overwhelmingly so. Plaintiff—usually the wife—would file suit, claiming that her husband had committed adultery or cruelty or another offense on the list. The defendant—usually the husband—would admit his wrongdoing, or simply not answer so that judgment would go by default.⁷ The judge (who was certainly aware of what was going on) would nonetheless grant the divorce. In New York, where only adultery would work, there were flamboyant schemes of fake adultery. The husband would check into a hotel and get partly or wholly undressed. A woman would come in and do the same. A photographer would magically appear and take pictures; the woman would get paid and leave the room; the pictures would be shown, later, to a judge, in court, as evidence that the husband had committed adultery. The judge would accept the evidence, even though he must have known the evidence was fake, even though the woman’s name was never given, and even though no sane couple, who were in their underwear and about to have sex,

³ N.Y. CODE CIV. PROC. § 1756 (1881).

⁴ See 2 CHESTER G. VERNIER, *AMERICAN FAMILY LAWS* 67 (1932).

⁵ See Note, *Collusive and Consensual Divorce and the New York Anomaly*, 36 COLUM. L. REV. 1121 (1936) [hereinafter *Collusive and Consensual Divorce*]; *Thompson v. Thompson*, 70 Mich. 62, 63 (1888); 2 VERNIER, *supra* note 4, at 87.

⁶ *Sheehan v. Sheehan*, 77 A. 1063, 1066 (N.J. Ch. 1910).

⁷ See Lawrence M. Friedman & Robert V. Percival, *Who Sues for Divorce? From Fault Through Fiction to Freedom*, 5 J. LEGAL STUD. 61, 65 (1976).

would blithely answer a knock on the door. The blonde woman in the black silk pajamas, as one judge described her, was simply acting a part. And so, of course, was the husband.⁸

In other states, collusion took forms that were less dramatic but equally fake—in some states, there seemed to be a positive epidemic of cruelty, for example. For almost a century, collusion reigned supreme. There were occasional crackdowns; and a judge here and there staged a minor rebellion and asked for positive proof of the plaintiff's case.⁹ But these were exceptional. A study of San Francisco divorces from the period 1910-1918 found that the defendant defaulted in seventy-six percent of the cases; and in half of the remaining cases, "he appeared apparently to facilitate, rather than defeat, the obtaining of the divorce."¹⁰ The situation was the same in other states as well.

But in the twentieth century, times were changing; gender relations were changing; family structures were changing. The collusion system began to fray around the edges. Some states allowed a plaintiff to get a divorce, even without proving "grounds," if the parties stayed apart for a certain number of years. In 1933, New Mexico added to its list of grounds "incompatibility," which means, in ordinary English, that a couple just cannot get along.¹¹ These were straws in the wind. And then, in 1969, California passed the first "no-fault" statute;¹² and very soon afterwards, no-fault spread to almost all the other states. No-fault laws did away altogether with the concept of grounds for divorce. No-fault went beyond consensual divorce: it allowed unilateral divorce—if either he or she wanted out, they were out, and the other he or she had no power to say no. You could get a divorce for any reason or no reason at all.¹³ The last holdout state, New York, finally fell into line a short time ago. At that point, the dual system of divorce had finally, irrevocably, and totally crumbled into dust.

Divorce law was, perhaps, the most blatant of the dual systems. But it was not the only one. Another good example was the law of prostitution. Actually, the laws that dealt with the "oldest profession" were rather complex. Oddly enough, in many states it was not entirely clear whether prostitution as such was illegal. Prostitutes, especially streetwalkers, were arrested on a regular basis; but the usual charge was vagrancy, lewd

⁸ See *Collusion and Consensual Divorce*, *supra* note 5, at 1127.

⁹ See, e.g., *Cobina Wright Denied Divorce from Ex-Broker*, CHI. TRIB., Mar. 29, 1935, at 15.

¹⁰ Sam B. Warner, *San Francisco Divorce Suits*, 9 CALIF. L. REV. 175, 178 (1921).

¹¹ See Lawrence M. Friedman, *A Dead Language: Divorce Law and Practice Before No-Fault*, 86 VA. L. REV. 1497, 1527 (2000).

¹² Family Law Act of 1969, ch. 1608, 1969 CAL. STAT. 3323-24.

¹³ For more information on the history and background of no-fault, see HERBERT JACOB, *SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES* 62-69 (1988).

behavior, or the like.¹⁴ On the other hand, owning or running a house of prostitution was undoubtedly a crime. In Pennsylvania, for example, it was a misdemeanor to “keep and maintain a common bawdy-house or place for the practice of fornication.”¹⁵ There were similar laws in other states. These houses, therefore, were illegal; yet they flourished in every American city, big and small. And many cities had “red light districts,” vice areas, where brothels and gambling joints were concentrated. Matthew Hale Smith, writing in the second half of the nineteenth century, pointed out that New York City had no shortage of “houses of ill-repute;” indeed, he claimed that, as of 1866, there were 615 houses of prostitution in the city, along with 99 “houses of assignation, and 75 “concert saloons of bad repute.” The number of prostitutes, bar maids of “bad character,” and other “vile girls” came to some 3,000.¹⁶

These brothels and “houses of ill-repute” were hardly a secret. They were all, according to Smith, “known to the authorities.” The police simply “do not meddle” with the houses, unless they “disturb the peace, or become a public nuisance.”¹⁷ Indeed, secrecy would have been counterproductive; customers needed to know where to go. In Chicago, in the 1880s, there was a Sporting and Club House Directory, a big help for men looking for sexual services. Police, of course, could read the directories as well as the customers.¹⁸ As the Philadelphia Vice Commission put it in 1913, any police officer who was unaware of the “immoral” houses on his beat deserved to be “dismissed for stupidity.”¹⁹ But of course, the police everywhere, and not just in Philadelphia, were well aware of the houses, and where they were.

Partly, of course, the system was simply corrupt. Owners of “immoral houses” could and did make regular payoffs to the police. And in many cities, the police in effect regulated the business of prostitution, though nothing in law authorized them to do so. In Atlantic City, New Jersey, and Cheyenne, Wyoming, vice was “licensed in fact, though not in law.” The authorities levied regular fines against “houses of ill-fame.” Prostitutes had to undergo medical examinations, and pay a kind of fee of ten U.S. dollars a

¹⁴ See MARK KANN, *TAMING PASSION FOR THE PUBLIC GOOD: POLICING SEX IN THE EARLY REPUBLIC* 153 (2013). Under California law, “common prostitutes” were included in the definition of a vagrant. See *People v. Allington*, 229 P.2d 495, 497 (1951).

¹⁵ 1860 Pa. Laws 43.

¹⁶ MATTHEW HALE SMITH, *SUNSHINE AND SHADOW IN NEW YORK* 371-72 (Hartford, J. B. Burr & Co., 1880).

¹⁷ *Id.*

¹⁸ DONALD L. MILLER, *CITY OF THE CENTURY: THE EPIC OF CHICAGO AND THE MAKING OF AMERICA* 508 (1996).

¹⁹ PHILA. VICE COMM’N, *A REPORT ON EXISTING CONDITIONS: WITH RECOMMENDATIONS TO THE HONORABLE RUDOLPH BLAKENBURG, MAYOR OF PHILADELPHIA* 11 (1913).

month.²⁰ Moreover, in some cities, the police laid down formal rules to govern the brothels in the city. Under Chicago's 1910 police rules, for example, no young delivery boys were allowed to enter a brothel; houses were not to have signs advertising their product; no brothel was to have "swinging doors" that let people peek inside; no "house of ill-fame" was to operate outside the red light district, or within two blocks of a school, church, or hospital.²¹ These were, in short, regulations that governed a business that was, in fact, completely against the law.

In the first decades of the twentieth century, there was an aggressive campaign to put an end to this particular dual system. For various reasons, a powerful body of opinion demanded an end to the existing arrangements. Sin, vice, debauchery were not to be tolerated; it was to be a fight to the death. Moral leaders insisted it was time to abandon the "old conception" that prostitution could not be wiped off the face of the earth.²² One of the forms the battle took was the so-called red-light abatement movement. Tough laws were passed to suppress the "social evil." Private citizens, in some states, were allowed to bring actions to "abate" brothels as nuisances. The movement was, on the surface at least, quite successful. There were crackdowns in San Francisco, New Orleans, and many other cities.²³ This was part of a wider attack on vice, which included passage of the famous Mann Act, which made it a crime to transport a woman across state lines for prostitution or any other "immoral purpose."²⁴ Needless to say, all of these efforts did not put an end to commercial sex. And, in the last half of the twentieth century, in the age of the so-called sexual revolution, a lot of the work of the crusade against vice came completely undone.

These two dual systems are, in short, ancient history. But why did we have them in the first place? Dual systems are complex; and they cannot be reduced to a formula. They do, however, seem to conform to particular patterns. Take the law of divorce, for example, in the age of collusion. The system, with its high forms and its low forms, arose out of a kind of social and political stalemate. An irresistible force, as it were, met an immovable object. Respectable opinion was the immovable object. It was out of the question to change the law to make divorce cheap and easy. The Catholic Church rejected the very idea of divorce. The Protestant churches were less

²⁰ MINNEAPOLIS VICE COMM'N, REPORT OF THE VICE COMMISSION OF MINNEAPOLIS TO HIS HONOR, JAMES C. HAYNES, MAYOR 59-60 (1911).

²¹ CHI. VICE COMM'N, THE SOCIAL EVIL IN CHICAGO 329 (1911).

²² LAWRENCE M. FRIEDMAN, GUARDING LIFE'S DARK SECRETS: LEGAL AND SOCIAL CONTROLS OVER REPUTATION, PROPRIETY, AND PRIVACY 187 (2007).

²³ *Id.* at 186-89.

²⁴ Mann Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421-24 (1998)); see also DAVID J. LANGUM, CROSSING OVER THE LINE: LEGISLATING MORALITY AND THE MANN ACT 221-241 (1994).

absolute; but they considered divorce at best as a necessary evil, a symptom of social pathology, to be used only in rare and extreme circumstances. The irresistible force was the actual demand for divorce. For various reasons, this demand kept rising in the nineteenth century, and into the twentieth century. More and more couples—thousands and thousands of them—and more and more each decade, were eager to change their lives, eager to get out of a loveless or hopeless marriage. Yet the formal law of divorce did not budge. Legislatures simply would not move; the voices against reform were powerful and concentrated; the demand for divorce, on the other hand, was diffuse and spoke in a whisper. What resulted was a kind of informal compromise. The moralists got to keep their strict laws. The public got their divorces. Of course, neither side actually liked this arrangement; it was constantly criticized, because it thrived on perjury;²⁵ but it was the best that either side could hope for, and for about a century, it remained more or less in place.

Something similar can be said about nineteenth century prostitution. Of course, no churchgoer, no member of the clergy, and no political figure, could ever utter a word in favor of prostitution. It was an evil, no question. But there it was. Hundreds of thousands of men were eager to buy what prostitutes had for sale. There was, in short, a huge demand for this kind of sexual outlet. And thus here too we find a stalemate. Legalizing prostitution was unthinkable; even regulating it was beyond the tolerance level of high public opinion. St. Louis, in 1870, enacted an ordinance allowing the police to license prostitutes. A firestorm of criticism, warnings of floods of “pent-up lust,” and “Parisian morality,” and the like, quickly put an end to this noble experiment.²⁶ Another case of irresistible force and immovable objects. The result can roughly be compared to the compromise on divorce. The moralists got their laws. The men got their brothels. Of course, there were also big differences. Divorce itself was not illegal. It was an official status, recognized by law. Prostitution had no such recognition. And its customers were hardly eager for publicity.

In both cases, we have a ruling or governing ideology, which stigmatizes or outlaws a commodity or behavior for which there is a strong demand. This, of course, is true much more broadly: there is or has been a strong demand for all sorts of illegal products—liquor during Prohibition; marijuana and other drugs; gambling at a time when it was not generally allowed. There is and has been also a demand for many other illegal behaviors, from jaywalking to insider trading. It was illegal in the nineteenth century and the early twentieth century to buy and sell

²⁵ See David G. Wittels, *Perjury Unlimited*, SATURDAY EVENING POST, Feb. 18, 1950, at 135.

²⁶ FRIEDMAN, *supra* note 22, at 136.

pornography.²⁷ The states had such laws; and Congress, feeling that state laws were ineffective, enacted a federal law in 1873, the so-called Comstock Law, to keep this literature out of the mail.²⁸ Pornography flourished nonetheless. The difference between these various illegalities, and the two situations we described—divorce law and prostitution—is probably a question of degree. What sets a dual system apart is the sheer magnitude of the gap between the high and the low. One level of the legal system operates by one set of rules, and another level operates with entirely different ones. Judges, police officials, and municipal authorities were complicit in the divorce charade, and also in the legal immunities of the vice districts; but this was not true for (say) dirty books or securities fraud or sales of cocaine or heroin.

Legal norms, including the criminal code, reflect social norms—the ruling customs, ideologies, and opinions of society; or, more accurately perhaps, the customs, ideologies and opinions of the ruling sectors of society. In dual systems, one side represents that side of the picture, and occupies, at least in the opinion of elites, the moral high ground. The other side represents the consumers, usually (but not always) people with a lower social status. Or, at times, the low side is in reality only the dark side of the elites, the personality or habits that play Hyde to their normal Dr. Jekyll. You can, if you wish, call their behavior hypocritical: the respectable burgher who, after church services, sneaks off to a brothel. Or, if we wish to be more charitable and forgiving, we can recognize that people are complicated, inconsistent, and buffeted by competing desires and demands.

SOCIALIST LAW

The countries in the Soviet bloc, before the bloc collapsed toward the end of the twentieth century, provide us with another rich source of examples of dual systems. Communist countries claimed allegiance to a specific ideology—Marxist-Leninist thought. They rejected the capitalist system, abolished private property as much as possible, and vested in the state ownership of the means of production. Official ideology expressed the hope, or belief, that a new breed of human being would develop under socialism—people educated to live in the brave new world; greed and the competitive spirit would wither away in a polity run by and for workers and

²⁷ See, e.g., Minn. Stat. Ch.100, § 12(a) (1888).

²⁸ Comstock Act, ch. 258, § 2, 17 Stat. 599 (1873) (repealed by 18 U.S.C. § 1461 (1994)) (an “Act for the Suppression of Trade in, and Circulation of, Obscene Literature and Articles of Immoral Use”). The “articles of immoral use” included any contraceptives or devices or materials to induce abortion. For more on state law, and the background of the Comstock Act, see DONNA DENNIS, *LICENTIOUS GOTHAM: EROTIC PUBLISHING AND ITS PROSECUTION IN NINETEENTH-CENTURY NEW YORK* 238-274 (2009).

peasants. Yet the reality was light-years away from this kind of society. The “dictatorship of the proletariat” was in practice simply a dictatorship. The official economy was a socialist economy; but alongside it, there grew up another economy, a “shadow economy . . . ruled by a private moral code.” The quote is from Inga Markovits’ study of the local courts and the local legal system in a town in East Germany, beginning in 1945, and ending with the fall of the East German regime.²⁹ Markovits describes, for example, a vigorous black market in used cars. Cars, like other commodities, were subject to state price controls. But “[n]obody in his right mind” would sell a used car, or buy a used car, at the legal price. Instead, people bought used cars at a more or less free market that was held once a month “on a big empty field behind the remnants of the city wall.”³⁰ In short, this illegal market was open and notorious. Moreover, sellers and buyers engaged in various devices and tricks, designed to disguise illegal contracts and deals for used cars, in such a way as to make these contracts enforceable in the regular courts, if the deal turned sour. In some ways, this resembles the collusive system in American divorce law. Everybody, including the judges, knew about the used car market. This market was against the law. But it functioned. And here too we might describe the situation, in a way, as a certain kind of stalemate, a certain kind of compromise. The high law was Communist ideology, and the rigid state system of price control. The low law was the actual market for used cars. The government got, or kept, its ideology. Buyers got their cars; and sellers got their prices.

What Markovits describes for East Germany was almost certainly true elsewhere in the Soviet bloc, with of course some variations. Maria Łoś studied criminality in Poland and the Soviet Union in the 1980s. People in both countries had very little faith in their governments, which they considered corrupt and ineffective. Moreover, nobody (or hardly anybody) believed any longer in the official ideologies, if they ever did. The result was a situation “conducive to the wide-spread criminal involvement of rank-and-file employees, industrial workers and peasants,” who had no loyalty to the state economy.³¹ In such circumstances, dual systems are peculiarly likely to arise; and they did arise in both Poland and the Soviet Union itself.

²⁹ INGA MARKOVITS, *JUSTICE IN LÜRITZ: EXPERIENCING SOCIALIST LAW IN EAST GERMANY* 224 (2010). There is no such place as Lüritz; for reasons of confidentiality, Markovits conceals the identity of “the place hiding behind the name . . . a town of about 55,000 inhabitants.” *Id.* at 1.

³⁰ *Id.* at 225.

³¹ MARIA ŁOŚ, *COMMUNIST IDEOLOGY, LAW, AND CRIME* 303 (1988).

“KILLING NO MURDER”: ON UNWRITTEN LAWS³²

In 1859, Daniel Sickles, a Congressman from New York, went on trial for murder in the District of Columbia. Sickles was accused of murdering Philip Barton Key, who had had an affair with Teresa Sickles, the Congressman's young wife. The basic facts of the case were pretty much uncontested. Sickles found out (from an anonymous note) that his wife was carrying on with Key; he confronted her, and she confessed. Sickles took a gun, found Key on the streets of Washington, and shot him dead.

The case was, of course, a local sensation. Sickles' lawyers mounted, essentially, two defenses. The first, which was fairly flimsy, was temporary insanity: the dread news drove Sickles out of his mind, at least for the time being. The second, which was stronger, was that the home-breaker, Key, deserved to die. This was a far more powerful argument; but it had no basis whatsoever in the laws of the District. It was, however, extremely persuasive. The jury returned a verdict of not guilty. Sickles went free.³³

This was one of the earliest in a line of cases on the so-called “unwritten law.” There were dozens of later examples. The famous photographer, Edward Muybridge, had married a much younger woman. Muybridge, in 1874, stalked and killed a man named Harry Larkyns, who had had an affair with Muybridge's wife, and who may have fathered her child. Muybridge was put on trial, but the jury acquitted him, to the cheers of throngs in and around the courthouse.³⁴

These cases were completely typical. When men like Sickles and Muybridge killed a rival, a man who had carried on with their wives, and were tried for the killing, juries simply did not convict. The defense team usually made at least a half-hearted attempt at some sort of legal excuse. Temporary insanity was a popular argument; the infidelity simply drove the poor husband mad and he killed during this brief fit of madness. Whether anybody actually believed this is another question. We have no window into the jury room, but it seems unlikely that this defense convinced juries (who were, in most cases, hostile to the insanity defense). Rather, they were persuaded by the unwritten law. The adulterer got what he deserved. The defendant, they felt, did what any red-blooded man would have done to a scoundrel who broke up his home.

The formal law, of course, had no truck with the unwritten law. Statutes defined murder in blanket terms. Murder, according to the

³² Lawrence M. Friedman & William E. Havemann, *The Rise and Fall of the Unwritten Law: Sex, Patriarchy, and Vigilante Justice in the American Courts*, 61 *BUFF L. REV.* 997 (2013).

³³ On Sickles himself—a fascinating character—see generally NAT BRANDT, *THE CONGRESSMAN WHO GOT AWAY WITH MURDER* (1991); W.A. SWANBERG, *SICKLES THE INCREDIBLE* (1956).

³⁴ EDWARD BALL, *THE INVENTOR AND THE TYCOON: A GILDED AGE MURDER AND THE BIRTH OF MOVING PICTURES* 279 (2013).

California penal code, was the “unlawful killing of a human being.”³⁵ “Unlawful” is not defined; but nothing in this, or any other statute, suggests that killing a sexual rival might be “lawful.” In 1907, a state senator in Virginia, Louis H. Machen, announced a plan to introduce a bill to make the “unwritten law” written and official in Virginia. The existing situation, he said, was a “farce and a comedy.” Why force men “to commit perjury,” why make juries violate their oaths, when nobody wanted to send to the gallows a man “who has killed . . . under circumstances which they know in their hearts would compel them also to commit a like crime?”³⁶ No doubt many people agreed. Yet apparently nothing came of his plan. The unwritten law stayed unwritten.

Juries indeed continued to acquit, in short order, defendants in these cases. There were also cases where brothers or other male relatives killed men who had “ruined” a sister or some other woman in the family.³⁷ Here too we find the unwritten law. Perhaps the unwritten law was strongest in the South; and there is some evidence that it was particularly strong in the early years of the twentieth century.³⁸ But it prevailed everywhere, during its golden age. Juries also applied this “law” to instances where women shot abusive husbands. Marion Constable studied cases in which a woman went on trial for killing a husband or lover, in Chicago, between 1870 and 1930. Only 24 women, out of a group of 265, were convicted. And few of those went to prison at all.³⁹ There were exceptions here and there to the various forms of the unwritten law; but the dominant pattern was rapid acquittal.

Why was the “unwritten law” unwritten? Why did nothing come of the state senator’s plan in Virginia? If this was a social norm—and the behavior of juries strongly suggests that it was—why did it never find expression in formal law? There is the conventional notion of the “slippery slope;” the idea that if you loosen a norm, like the ban on killing, you open a door that should remain closed, even though you open it only slightly, and for one purpose or situation only; once opened, it is felt, the door cannot be closed. But perhaps here, too, as in dual systems, a moral ideology of a fairly strict and rigid sort prevents recognition of the unwritten law. Juries (and some judges) may have liked the unwritten law; but there were at all

³⁵ Cal. Penal Code, § 187 (West).

³⁶ *Unwritten Law May Be a Statute*, CHI. TRIB., May 20, 1907, at 2.

³⁷ In 1907, two brothers were tried for killing a man who had impregnated their sister, married her in a shotgun wedding, and then tried to flee. See *Widowed Bride Tells Her Pathetic Story to Save her Brothers*, ATLANTA CONST., Feb. 28, 1907, at 1. The verdict was not guilty. *Strother Boys Freed and Judge Approves Verdict of the Jury*, ATLANTA CONST., Mar. 8, 1907, at 1.

³⁸ See Friedman & Havemann, *supra* note 32, at 1012.

³⁹ Marianne Constable, *Chicago Husband-Killing and the “New Unwritten Law,”* 124 TRIQUARTERLY REV. 85, 86 (2006).

times elite voices that spoke out against it. An essay in the Los Angeles Times, in 1922, called the practice “ghoulish;” it was a “wraith of the past when every man was a law unto himself;” it was atavistic, uncivilized.⁴⁰ Some prosecutors and judges denounced it, and insisted that the formal law had to be obeyed. Juries paid no attention. Here, to be sure, analysis in terms of high law and low law does somewhat break down. The unwritten law fit best the Southern honor code, and a kind of macho logic that is hard to pin to any particular social class. Men like Congressman Sickles were certainly part of the national elite.

Like the dual system of divorce, the “unwritten law” went into eclipse in the late twentieth century. No doubt there were still men who killed their rivals, but after about 1950, the “unwritten law” simply disappears as a defense in criminal cases.. Again, social and cultural change explains why this occurred. Clearly, concepts of family honor and masculinity in contemporary times are different from the way they were in the Victorian period. So too of the position of women, in family and society. There are still unfaithful wives; but perhaps what society expects is a divorce, not a volley of bullets aimed at her lover. A man who kills cannot expect the same kind of social indulgence that was shown to Congressman Sickles and his cohort.

“Honor killings” are probably rare today in Western societies. But they are horrifically alive in other parts of the world—conservative Muslim societies, for example, and in societies dominated by a particularly virulent concept of machismo (Brazil was for a time a notable example).⁴¹ In these societies, however, women, not men, are the victims. These “honor” killings follow a kind of particularly nasty form of unwritten law: if a woman brings disgrace to her family (even by getting raped!), she deserves to die—usually at the hand of her own father or brother. The underlying social norm is extremely powerful. Yet, in many countries where these honor killings occur, they lie completely outside the boundaries of the formal criminal code. Here again, there is a conflict between a ruling ideology, and a strongly-rooted social norm. In Jordan, for example, the elites, and the royal family, reject and denounce honor killing; the penal code does not authorize honor killing, at least not clearly and explicitly; nevertheless, the practice continues.⁴²

⁴⁰ *The Unwritten Law*, L.A. TIMES, Sept. 26, 1922, at 114.

⁴¹ See James Brooke, *‘Honor’ Killing of Wives Is Outlawed in Brazil*, N.Y. TIMES, Mar. 29, 1991, at B16. Despite this “outlawing,” the Annual Report for 2000 of the U. N. Commission on Human Rights lists Brazil as one of the countries in which “honor killings” have been reported. Special Rapporteur on Extrajudicial Executions, Report on Civil and Political Rights, Including Questions of Disappearances and Summary Executions U.N. Dec. E/CN.4/2000/327 (Jan. 25, 2000), p. 27 (by Asma Jahangir).

⁴² Catherine Warrick, *The Vanishing Victim: Criminal Law and Gender in Jordan*, 39 LAW &

I want to mention two other situations where a kind of unwritten law has operated—situations in which killing is treated as something less than murder. One is historical: neonaticide, that is, the killing of a newborn baby; the other is so-called mercy killing. They illustrate a point which is related to the ones mentioned thus far; but with some differences.

In the nineteenth century, in both England and the United States, it happened at times that women were accused of killing their newborn child.⁴³ The English cases, in particular, arose out of a single type-situation. A young woman in domestic service, unmarried, becomes pregnant. She hides this fact from her employers; and then, when the baby is born, she gets rid of it somehow—she strangles it, or buries the body, or throws the child into the Thames. Probably, most women who did this got away with it; the small bodies floating in the river were never identified. But some women were unlucky; they were found out, and they ended up in the toils of the law.

Life in domestic service in England was a way of life for thousands of young women. It was a precarious life of poverty and drudgery for many of them. Giving birth out of wedlock, for a young woman in domestic service, could often be a total disaster. It would almost certainly cost her her job. She might be rejected by her own family. There was no welfare state, and the poor girl could end up on the streets, facing misery and starvation. Murder was a capital offense. Killing a newborn baby was, legally speaking, just as much a murder as killing an older child, or an adult. But, according to the records of the criminal courts of London, the death penalty was almost never imposed on women charged with this crime. The (all-male) juries simply refused to convict them of murder.⁴⁴ Many of the women were acquitted; most of the others were convicted of a lesser crime, concealing the birth of a child.⁴⁵ These defendants would do a certain amount of jail time, but nothing more. This much is clear from the London records. Scattered data from other parts of England point in the same direction.⁴⁶ To be sure, there were evidentiary problems: the women often

SOC'Y REV. 315 (2005).

⁴³ On this crime in England, see Lawrence M. Friedman, *The Misbegotten: Infanticide in Victorian England* (unpublished paper); on the United States, Lawrence M. Friedman, *Dead on Arrival* (unpublished paper); see also LITA LINZER SCHWARTZ & NATALIE K. ISSER, *ENDANGERED CHILDREN: NEONATICIDE, INFANTICIDE, AND FILICIDE* (2000).

⁴⁴ Figures for the Old Bailey between 1828 and 1915 are in Friedman, *The Misbegotten*, *supra* note 43.

⁴⁵ This was also true in the United States. For example, an 1833 Georgia law criminalized "conceal[ing] or attempt[ing] to conceal the death of any issue . . . which if it were born alive, would by law be a bastard." 1833 Ga. Laws, ch. 4, § 22.

⁴⁶ Thus, in Kent between 1859 and 1880, no woman was found guilty of killing a newborn child; some women were convicted of the concealment charge, but most of these were sentenced to less than six months jail time. CAROLYN A. CONLEY, *THE UNWRITTEN LAW: CRIMINAL JUSTICE IN VICTORIAN*

claimed the child was born dead, which was not easy to disprove. Nonetheless, the results of the cases send an unequivocal message: killing a baby, under the circumstances these women were in, would simply not be treated as murder.

The American data are less reliable than the English data—we have no easy access to trial court records—but neonaticide occurred in the United States, too, and in some numbers. An article in the *Washington Post*, in 1884, claimed that sixteen bodies of dead infants had been found in the first quarter of the year.⁴⁷ Here too, the mother was often never identified. Where the mother was found and charged, there is reason to think that the cases came out much the same as they did in England. In 1869, a woman named Mary Regan, who worked as a servant in a house on Clay Street, in San Francisco, gave birth to a child; the family she worked for found the body “wrapped in a sheet,” in the bottom of an outhouse. Mary was arrested. She was accused of murder. She claimed the baby was born dead. Her husband, she said, had abandoned her. In Police Court, the judge dismissed her case and set her free. Meanwhile, her story had touched the hearts of the spectators; and a police officer “immediately went to work and made up a purse of fifty U.S. dollars for her relief.”⁴⁸

The second example is what has been called mercy killing. An elderly person, terminally ill, begs to be released from her suffering. If a husband, wife, relative, or doctor, helps the person into the next world, this is technically murder. That a person asked to die, or consented to die, is simply not a defense to a charge of murder. But here too, prosecutors tend not to prosecute; and when they do, juries do not convict. The trial of Dr. Herman Sander, in 1950, can serve as an example. Sander, a New Hampshire doctor, was accused of killing a patient, Abbie Borroto, by injecting air into her veins. She was dying of cancer, and suffering from unbearable pain. Most people (and the newspapers) thought this was a clear case of mercy killing, although Dr. Sander made the rather lame excuse that the woman was already dead when he injected her. Here the prosecutor argued to the jury that murder was murder; nobody was entitled to take the “law into his own hands.” The jury felt otherwise; they acquitted the doctor after deliberating only one hour. The verdict was extremely popular. The dead woman’s husband called it “heart-warming.”⁴⁹ In 1974, Dr. Vincent A. Montemarano was acquitted in another mercy killing case. The doctor

KENT 110-11 (1991).

⁴⁷ *Is Infanticide Increasing?*, WASH. POST, Mar. 31, 1884, at 4.

⁴⁸ See S.F. CHRON., Dec. 4, 1869, at 3; Dec. 17, 1869, at 1; Dec. 24, 1869, at 3.

⁴⁹ Russell Porter, *Sander Acquitted in an Hour; Crowd Outside Courtroom Cheers*, N.Y. TIMES, Mar. 10, 1950, at 1; Russell Porter, *Borroto Calls Verdict ‘Most Heart-Warming’*, N.Y. TIMES, Mar. 10, 1950, at 23.

was accused of injecting potassium chloride into the veins of a patient with terminal cancer. Here too the defense claimed, rather feebly, that the patient was already dead at the time. The jury quickly reached a verdict: not guilty. At these words, people in the crowded courtroom “broke into loud and prolonged applause.”⁵⁰

In some cases, a jury did find the defendant guilty; or the defendant pleaded guilty. But the punishment tended to be minimal. In 1982, Vahan Kacherian, eighty-eight years old, pleaded guilty to voluntary manslaughter; he had killed his eighty-eight-year-old wife, who had been “left helpless by strokes.” He had a record of caring for his wife, “devotedly bathing and feeding her even though he was somewhat of an invalid himself.” The prosecutor called it a “mercy killing.” Vahan received a suspended sentence.⁵¹

These last two decisions illustrate once more the power of the jury to modify the living law. The jury works in total secrecy; and announces its results in a few gnomic words. It is hard to know why a jury does what it does; but when we examine patterns of jury decision, more or less plausible guesses are possible. The acquittal of Dan Sickles tells us only a little; a long line of cases, in which juries behave in a similar way, tells us a lot.

All the examples given so far illustrate a kind of legal dualism. In the first group of situations—divorce, prostitution—the pattern was a pattern of high law and low law. Formally, officially—or, as it were, on top—is an elite and an elite ideology, one that claims the moral high ground. Below is real life, messy, demanding, answering to other desires and other norms. Low law often answers to a strong consumer demand—for forbidden fruit. Or it makes exceptions to a rule that seems too harsh. Where we have trial by jury, the jury can make these exceptions; they answer to no one, and their decisions cannot be reviewed. In other instances, lower court judges or police officials are the ones who bypass the formal law.

In other cases of “unwritten law,” the dynamic is somewhat different. Take mercy killing, for example. The public seems genuinely conflicted, and has been for some time. A Gallup poll conducted in 1950 found that some forty-three percent of the public favored mercy killing; some forty-six percent were opposed—a fairly even split.⁵² Here we have, perhaps, not high versus low, but general versus specific. That is, many or most people

⁵⁰ The most dramatic moment in the trial came when Dr. Antony Di Benedetto, chief of surgery, testified that Dr. Montemarano had confessed to what he had done; at this point, Dr. Di Benedetto “lowered his head, put his hand over his face and wept.” Roy R. Silver, *Physician Acquitted in Patient's Death*, N.Y. TIMES, Feb. 6, 1974, at 1.

⁵¹ *Term Waived for Mate in Mercy Killing*, L.A. TIMES, Feb. 20, 1982, at A3. Vahan stabbed his wife with a pocketknife; and then stabbed himself “in a suicide attempt,” which obviously did not work.

⁵² George Gallup, *Poll Shows Most Oppose Mercy Killing*, L.A. TIMES, Feb. 4, 1950, at 31.

feel that (for one reason or another) there ought to be a stern general rule; while at the same time, many or most people feel that some instances call for more lenient treatment.

In all of the situations discussed, the formal law was (or continues to be) relatively immovable, either because of a clash between a powerful high and a powerful low; or because of the war between the general and the particular. But norms change, interests and values change, social dynamics change. The sexual revolution and the gender revolution put enormous pressure on the rickety house of divorce law, and the no-fault revolution destroyed it completely. The social conditions that produced infanticide are no longer with us. The welfare state is kinder to unwed mothers than the high Victorian era. Illegitimacy is no longer so shameful; women who give birth out of wedlock are unlikely to starve. Neonaticide still happens; but economic desperation is no longer the cause. A woman who kills a newborn is thought to be mentally ill. Or, in some cases, an unhappy teenager in trouble who simply cannot face the burdens of motherhood.

Mercy killing is still a kind of dual system, though here too there are signs of change. “Assisted suicide” is now possible in Oregon and Washington; under the “Death with Dignity” laws in these states, a resident, who is competent, who wants to die, and is suffering from a terminal disease, may “make a written request for medication” which will end his life “in a humane and dignified manner.”⁵³ It would be wrong—or at least premature—to feel that all dual systems disappear in the course of time, that all unwritten laws either get written down or vanish into thin air. Some will, and some will not. Tension between high and low, between general and specific, most likely will never go away. New types and new forms may appear in the future, in ways impossible to predict.

⁵³ OR. REV. STAT. § 127.805 (1999); WASH. REV. CODE § 70.245.020 (2009).